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6 Attorneys for Official Committee
7 of Unsecured Creditors

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF CALIFORNIA
10 SACRAMENTO DIVISION

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12 In re:

13 MATTERHORN GROUP, INC.,
14 Debtor.

15 VITAFREEZE FROZEN
16 CONFECTIONS, INC.,

17 Debtor.

18 DELUXE ICE CREAM
19 COMPANY,

20 Debtor.

21 Affects ALL DEBTORS
22 Affects only MATTERHORN GROUP,
INC.
23 Affects only VITAFREEZE FROZEN
CONFECTIONS, INC.
24 Affects only DELUXE ICE CREAM
COMPANY

Lead Case No. 10-39672-A-11

Jointly Administered with
Case Nos. 10-39664 and 10-39670

DC No. LNB-13

Chapter 11 Cases

**PRELIMINARY OPPOSITION
TO DEBTORS' EMERGENCY
MOTION FOR AN ORDER
APPROVING SETTLEMENT
AGREEMENT BETWEEN THE
DEBTORS AND KEY BANK**

Date: October 25, 2010
Time: 9:00 a.m.
Judge: Michael S. McManus
Place: Department A
Courtroom No. 28
Floor No. 7

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1 The Official Committee of Unsecured Creditors in the above-captioned cases (the
2 "Committee"), hereby files this Preliminary Opposition to Debtors' Emergency Motion for an
3 Order Approving Settlement Agreement Between the Debtors and Key Bank ("Settlement
4 Motion"). This Opposition is based on the underlying Settlement Agreement that raises
5 disconcerting questions about the Bank's claims calculation, potential lender liabilities, and
6 unfair treatment of unsecured creditors. The Committee is currently in discussions with the
7 Bank and the Debtors regarding the issues present in this Opposition. The parties are trying to
8 work through these issues and the Committee may be in a position to support a revised
9 Settlement Agreement by the time of the hearing on October 25, 2010.

Under the Settlement Agreement signed by and between the Key Bank, N.A. (the
“Bank”) and Matterhorn Group, Inc., Vitafreeze Froze Confections, Inc., and Deluxe Ice
Cream Company (collectively, the “Debtors”), the proposed distribution of the sale proceeds
of the Debtors’ assets appears to keep the Estates administratively solvent, but does not
appear to result in any distribution to the unsecured creditors of the Debtors who are owed
over \$8,000,000.00, not including a potential deficiency claim by the Bank. Additionally,
there are some questions regarding the lending relationship between the Bank and the Debtors
that may potentially affect the fairness of the Settlement Agreement.

18 | Ultimate Recovery By The Bank Notwithstanding Potential Lender Liabilities

19 The unsecured creditors of the Debtors are in a position of having extended unsecured
20 credit to the Debtors whose financial situation turned out to be more precarious than
21 previously represented to, or understood by the unsecured trade creditors. Due to the nature
22 of the Bank's lending relationship with the Debtors, the Bank was in a position to understand
23 the true financial health of the Debtors. Yet, it appears that the Bank continued to assist the
24 Debtors in limping along and incurring unsecured credit to the current group of unsecured
25 trade creditors. Despite continuous defaults by the Debtors, the Bank continued to forbear
26 and extend credit to the Debtors.

Under the current version of the Settlement Agreement signed by the Bank and the
Debtors, it does not appear that there will be any distribution to unsecured creditors in this

1 case, unless both the sale price achieved at the § 363 sale and the avoidance actions result in
2 “home runs” for the Estates. Therefore, the Committee is opposed to the Settlement Motion
3 that is based on the current version of the Settlement Agreement.

4 Zero Recovery For The Unsecured Creditors

5 At first glance, the terms of the Settlement Agreement appear to treat secured debt and
6 unsecured debt fairly by splitting the sale proceeds 85% to the Bank and 15% to the Estates.
7 But a careful examination of the terms of the Settlement Agreement and the Estates’ financial
8 condition shows that it is highly unlikely that the unsecured creditors would receive any
9 distribution under the current terms, given the amount of administrative claims accruing in the
10 case (the largest of which are potential claims under 11 U.S. C. § 503(b)(9)).

11 The Bank’s Calculation Of Its Alleged Super Priority Claim

12 The Settlement Agreement provides for allocation of \$2.5 million to the Bank on an
13 alleged super priority claim under 11 U.S.C. § 507(b) without demonstrating how the Bank
14 and the Debtors calculated that claim and without providing any supporting documents. The
15 Settlement Agreement simply states that this amount will compensate the Bank for the
16 diminution in value of the Bank’s collateral. The settlement of the alleged super-priority
17 claim without supporting documents and an accurate calculation is problematic for several
18 reasons.

19 First, throughout the pendency of the Debtors’ bankruptcy case, the Bank has been
20 collecting monthly adequate protection payments from the Debtors to address any diminution
21 of the Bank’s collateral.

22 Second, the Bank should provide an accurate and detailed calculation along with any
23 supporting documents (or at least some explanation) showing the basis for the alleged super-
24 priority claim and why \$2.5 million is a reasonable settlement figure. A rough calculation by
25 the Committee shows the cash balance of the Debtors as of the proposed sale closing date to
26 remain same as the cash balance as of the petition date; and, the Committee believes that the
27 pendency of this chapter 11 has actually enhanced the value of the Bank’s collateral.

1 Third, the Bank has not demonstrated that it has a perfected security interest in the
2 Debtors' cash, making the assertion of a § 507(b) claim, to the extent based on use of cash,
3 highly suspect. And, to the extent the basis for a § 507(b) claim is an inventory write off by
4 the Debtors, the Debtors' representative, Nathan Bell, explained that the write off was simply
5 an accounting write off and did not actually decrease the Debtor's inventory. Therefore, any
6 write-downs in inventory or other assets of the Debtors that occurred post-petition do not
7 reduce the value of the Bank's collateral; they are simply accounting adjustments to reflect
8 actual value -- in other words, the book value of the Bank's collateral as of the petition date is
9 not the proper comparison to make to the market value of the asset at a sale. The borrowing
10 base certificate calculation as of the petition date as compared to the asset sale price following
11 auction is simply an improper method to calculate a diminution in value claim.

12 Committee counsel has requested the supporting calculation from the Bank counsel,
13 but as of October 18, 2010, it has not been fully provided. Additionally, the Committee
14 would like to highlight that the bankruptcy case has enhanced, not diminished, the value of
15 the Bank's collateral, because without the bankruptcy case, the Debtors' companies would
16 have cratered into liquidation. At least under the current scenario under the Settlement
17 Agreement, the Bank stands to achieve more than liquidation value.

18 Preference Liability And Lapse Of UCC Filing Statement

19 Additionally, the Bank faces preference liability for payments received in the 90 days
20 prior to filing of Debtors' bankruptcy. As of the filing date of the Debtors' bankruptcy case
21 on July 26, 2010, the Bank received \$439,262.51 from the Debtors in the 90 days prior to the
22 petition date. The Bank also does not have a perfected security interest in any of Matterhorn
23 Group Inc.'s assets, including cash and accounts receivables.

24 Conclusion

25 For the foregoing reasons, the Committee respectfully requests that the Court deny the
26 Debtors' Settlement Motion to allow the Debtors, the Bank, and the Committee an
27 opportunity to revise the Settlement Agreement that will reflect a fair treatment of the secured
28 debt as well as the unsecured debt. The Committee further requests that the Court grant such

1 other and additional relief as the Court deems just and proper under the circumstances of these
2 cases.

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4 DATED: October 18, 2010

DOWNEY BRAND LLP

5 By: _____
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7 JAMIE P. DREHER
8 AILEEN J. KIM
9 Attorney for Official Committee of Unsecured
10 Creditors

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